Office-Supreme Court, U.S.
FILED
DEC 21 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-841

IN THE

Supreme Court of the United States

October Term, 1982

DON'T WASTE WASHINGTON
LEGAL DEFENSE FOUNDATION,
Petitioner,
v.
STATE OF WASHINGTON, et al.,
Defendants,
v.
WASHINGTON STATE BUILDING AND
CONSTRUCTION TRADES COUNCIL, AFL-CIO,
et al.; and UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF OF RESPONDENTS WASHINGTON STATE BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO, et al. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a state law banning the transportation into and subsequent storage within the state of only that radioactive waste generated outside the state's borders in violation of the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3?

2. Is such a state law preempted by the federal Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296 (1976 & Supp. IV 1981), and the Low-Level Radioactive Waste Policy Act, 42 U.S.C. §§ 2021b-2021d (Supp. IV 1981), in violation of the Supremacy Clause of the United States Constitution, Art. VI, cl. 2?

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CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to the constitutional provisions and statutes cited by petitioner, set forth in the appendix are Section 274 of the Atomic Energy Act of 1954, 42 U.S.C. § 2021(b), and the entirety of the Low-Level Radioactive Waste Policy Act, 42 U.S.C. §§ 2021b-2021d.

STATEMENT OF THE CASE

This case involves the attempt, so far unsuccessful, of the state of Washington to close its borders to the importation and storage of radioactive waste generated outside its borders.[1]

In November 1980, the voters of the state of Washington adopted Initiative Measure 383, the Radioactive Waste Storage and Transportation Act of 1980, chapter 70.99 of the Revised Code of Washington ("Initiative 383"). Effective July 1, 1981, Initiative 383 would have banned the transportation into Washington and the subsequent storage there of non-medical radioactive waste generated outside the state of Washington, unless permitted by interstate compact.

Initiative 383 contains a series of legislative findings, the first of which is that radioactive waste is dangerous and that releases of radioactive materials and emissions into the environment are inimical to the health and welfare of the people of the state. Greater volumes of radioactive waste are said to increase the likelihood of an accident, with attendant harm to Washington's citizens. The findings state:

> The people of the state of Washington believe that the principles of federalism do not require the sacrifice of the health, safety, and welfare of the people of one state for the convenience of other states or nations.

Initiative 383, § 1.

Section 3 of Initiative 383 provides that after July 1, 1981,

> no area within the geographic boundaries of the state of Washington may be used by any person or entity as a temporary, interim, or permanent storage site for radioactive waste, except medical waste, generated or otherwise produced outside the geographic boundaries of the state of Washington.

Section 4 provides that after July 1, 1981,

> no person or entity may transport radioactive waste, except medical waste, generated or otherwise produced

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1. Initiative 383 does not ban the importation of "medical" radioactive waste generated outside the borders of Washington.

> outside the geographic boundaries of the state of Washington to any site within the geographic boundaries of the state of Washington for temporary, interim, or permanent storage.

Violation of Initiative 383 is a gross misdemeanor, punishable by a civil penalty of one thousand dollars per violation. *Id.* at § 5. Violations may be enjoined by action of the state Attorney General or by any person residing within the state. *Id.* Initiative 383 may be modified to the extent that the state of Washington enters into a regional compact for the storage of radioactive waste.[2] *Id.* at §6.

Initiative 383 contains no regulatory controls over radioactive waste generated within the state of Washington. The effect of Initiative 383 is to ban the importation into the state of Washington of low-level radioactive waste for purposes of storage in Washington, while allowing the continued transportation and disposal of such waste generated within the state.[3]

Low-level radioactive waste consists of garbage that has or may have been contaminated with radioactivity. It includes filter sludges, resins, filter bottoms, used gloves and protective clothing, rags, tools, papers, plastic and material used in the manufacture of smoke detectors, luminous dials and emergency exit signs. *Washington State Building & Construction Trades Council v. Spellman*, 684 F.2d 627, 629 (9th Cir. 1982). There are only three low-level radioactive waste disposal sites open to commercial users in the United States, and one of those, at Beatty, Nevada, is facing closure. Pet. at 5. The other two sites are located at Barnwell, South Carolina, and on the Hanford Reservation at Richland, Washington.

The Hanford site would be closed to out-of-state users if Initiative 383 were to become effective. Presently, Hanford

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2. A Northwest Interstate Compact on Low-Level Radioactive Waste Management, to which Washington is a party, has been submitted to Congress for ratification but has not yet been ratified.

3. Petitioners concede that regulation of high-level radioactive waste is reserved to the federal government. Pet. at i, n.1.

receives approximately forty percent of the nation's commercial low-level radioactive waste. Hanford is the only site accepting absorbed-liquid low-level waste. Approximately ninety-five percent of the waste received at Hanford originates outside the state of Washington. 684 F.2d at 629.

The Hanford site occupies 100 acres. The land is owned by the federal government and leased to the state of Washington, which, in turn, subleases it to US Ecology, the commercial operator of the site. *Id.* Pursuant to an agreement between the state of Washington and the Nuclear Regulatory Commission under Section 274 of the Atomic Energy Act, 42 U.S.C. § 2021, the state of Washington supervises the disposal site. State inspectors check incoming waste shipments to determine compliance with state and federal regulations concerning radioactive material. 684 F.2d at 629. The state charges fees to site users for the "perpetual surveillance and maintenance" of the deposited radioactive waste and recently enacted a thirty percent tax on the gross receipts of the site operator. Wash. Rev. Code § 43.21F.075(2), (1981); Wash. Rev. Code § 82.04.260(13) (Supp. 1982).

Low-level radioactive waste storage is a national problem. *Draft Low-Level Radioactive Waste Management Report*, U.S. Department of Energy, April 21, 1981, at 2 ("DOE Report"). Low-level radioactive waste is the inevitable byproduct of a variety of activities involving atomic energy. All fifty states and the District of Columbia generate low-level radioactive waste. In 1979, approximately fifty percent of the nation's low-level waste was generated by commercial power plants, nine percent by goverment or military facilities, twenty-two percent by industrial activities, and nineteen percent by medical and research institutions. DOE Report, at 3.

As the district court below observed, "The facts of this case present a classic supply and demand problem. It is clear that there is a serious national problem with the increasing volume of waste, which must be stored somewhere, and a nearly simultaneous reduction of the already limited storage capacity." *Washington State Building & Construction*

Trades Council v. Spellman, 518 F. Supp. 928, 931 (E.D. Wash. 1981).

In response to growing public concern over radioactive waste storage, including the adoption of Initiative 383, Congress enacted in 1980 the Low-Level Radioactive Waste Policy Act, 42 U.S.C. §§ 2021b-2021d (the "Low-Level Waste Act"). That act authorizes states to form interstate compacts for the purpose of establishing regional sites for low-level radioactive waste storage. Such compacts must be approved by Congress. After January 1, 1986, the compact states may exclude from their regional disposal sites waste originating outside the region.

After Initiative 383 was enacted, the private plaintiffs in this case (the "commercial users"), representing a broad spectrum of commercial interests using the Hanford site, brought an action to declare Initiative 383 to be unconstitutional and to enjoin its implementation.[4] Shortly thereafter, the United States brought a similar suit against the state of Washington. The cases were heard together in the district court and later consolidated by the court of appeals. Initiative 383 was defended by both the state of Washington and Don't Waste Washington, a public interest group that had sponsored the initiative.[5] The district court

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4. The commercial users have a direct interest in the continued operation of the Hanford low-level waste disposal site. Northern States Power Company and Precision Castparts generate low-level radioactive waste which is stored at Hanford. Chem-Nuclear provides packaging and solidification services for waste disposal. Tri-State Motor Transit hauls radioactive waste by motor vehicle in interstate commerce to Hanford. US Ecology is the site operator. Washington State Building and Construction Trades Council, AFL-CIO, represents union members in nuclear experimental activities related to the transportation and disposal of wastes at Hanford. Washington Voice of Energy and the Tri-City Nuclear Industrial Council are nonprofit citizens organizations promoting economic growth through the peaceful use of atomic energy. CR 20, pp. 2-5. (All references to the Clerk's record are to the record of *Washington State Building & Construction Trades Council v. Spellman* at the trial court level.)

5. Don't Waste Washington was denied intervention by the district court but was permitted to appear as amicus curiae and fully participated

granted summary judgment in favor of the commercial users and the United States. Both the state and Don't Waste Washington appealed. The Court of Appeals for the Ninth Circuit unanimously upheld the district court's conclusions that Initiative 383 violated the Commerce Clause and was preempted by federal law.

Don't Waste Washington now petitions for a writ of certiorari. The state of Washington has not sought review of the decision of the court of appeals. The commercial users submit this brief in opposition to the petition.

SUMMARY OF ARGUMENT

This Court should deny the petition because Initiative 383 is plainly unconstitutional, as both courts below found without strained analysis. This case is controlled by established precedent and presents no novel or unsettled issues of law that warrant Supreme Court review. There is no split of authority or conflict in the decisions of the courts of appeals to suggest that review of this case is appropriate. The state of Washington apparently thought so little of further legal defense of Initiative 383 that it declined to seek review of the decision of the court of appeals.

Washington's efforts to stop the flow of radioactive waste at its borders is a clear and dramatic interference with the free flow of interstate commerce. Initiative 383 bans the storage of out-of-state waste while permitting the continued storage of in-state waste. While health and safety justifications are urged in defense of Initiative 383, the petitioner fails to explain why radioactive waste generated within the state are safer than out-of-state waste, or why storage of in-state waste is to be preferred over the storage of wastes generated outside Washington's borders. Faced with a New Jersey ban on out-of-state waste destined for New

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Footnote 5 (con't)

in briefing and oral argument. The court of appeals reversed the district court's denial of intervention and accorded Don't Waste Washington intervenor status.

Jersey landfills, this Court struck down a very similar ban in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). While the nature of the waste involved here is different, and more exotic, Commerce Clause protections apply equally to "bads" as well as "goods." *Illinois v. General Electric Co.*, 683 F.2d 206, 213 (7th Cir. 1982), *petition for cert. filed sub nom. Fahner v. General Electric Co.*, No. 82-648, 51 U.S.L.W. 3320 (Oct. 12, 1982) (state law banning importation for storage of spent nuclear fuel held unconstitutional).

Petitioner asserts that this case presents an issue left unresolved in *City of Philadelphia*, namely, "whether the Commerce Clause precludes state prohibitions deemed essential to health and safety." Pet. at 9. This reference, however, is not to some new or unresolved area of law, but rather to the quarantine cases, where state authority to ban all commerce in noxious goods has been upheld. Such quarantine laws commonly require, for instance, the burial of diseased animal carcasses as promptly as possible. The critical difference between the quarantine laws and Initiative 383 is that the quarantine laws apply with equal force to in-state as well as out-of-state offal. Initiative 383 does not purport to require the burial of all radioactive waste as close as possible to the point of origin, but rather bans all out-of-state waste while permitting preferential treatment of in-state waste.

There is no conflict of law among the courts of appeals that would be resolved by hearing this case. *Illinois v. General Electric Co.*, the only similar case of which respondents are aware, involves Illinois' effort to ban the storage of spent nuclear fuel; the Seventh Circuit is in accord in that case with the Ninth Circuit in this case in holding such a law to be unconstitutional.

In arguing that Initiative 383 is not preempted by federal law, petitioner entirely neglects to mention the Atomic Energy Act of 1954, on which both the court of appeals and the district court relied in deciding the initiative to be preempted. 684 F.2d at 630; 518 F. Supp. at 931. The Atomic Energy Act is the keystone of the "pervasive federal statutory schemes for the regulation of radioactive waste." 518 F. Supp. at 931.

Instead, petitioner relies upon the Low-Level Waste Act for the proposition that Congress authorized the state of Washington to discriminate against out-of-state wastes. Pet. at 18. But the petitioner understandably fails to explain how the Low-Level Waste Act operates, because such an explanation would demonstrate that Initiative 383 is incompatible with the attainment of federal objectives set forth in the act. The Low-Level Waste Act authorizes the states to form regional compacts for the disposal of low-level radioactive waste. After congressional ratification of such a regional compact, and then only after January 1, 1986, waste generated outside the region may be exluded from the regional disposal sites. 42 U.S.C. § 2021d(a)(B). The Low-Level Waste Act encourages states to form regional compacts, for if they fail to do so, waste generated within their borders may be banned from existing disposal sites. By authorizing such exclusion only after January 1, 1986, however, the states are given a grace period in which to organize themselves for waste disposal.

Initiative 383 jumps the gun by imposing a single state 1981 ban. Both the court of appeals and the district court found that Initiative 383 was inconsistent with the federally proposed regional compact scheme. 684 F.2d at 630; 518 F. Supp. at 932-33. Both courts held Initiative 383 was preempted by federal law and violative of the Supremacy Clause.

Initiative 383 cannot stand if it violates either the Commerce Clause or the Supremacy Clause. There is nothing in the petition that merits a further review of this case, as a more detailed examination of the governing law will show.

ARGUMENT

I. The Ninth Circuit's Ruling That Initiative 383 Violates the Commerce Clause Is In Line With Established Supreme Court Precedent and a Recent Seventh Circuit Decision Addressing Identical Commerce Clause Issues.

Well-established Supreme Court precedent has guided the courts of appeals for both the Ninth and Seventh Circuits in striking down laws that forbid the transportation of radioactive waste into the state for storage or disposal but

allow the transportation and disposal of domestically generated waste.

In *Illinois v. General Electric Co.*, 683 F.2d 206 (7th Cir. 1982), the Seventh Circuit affirmed a grant of summary judgment below, declaring that Illinois' Spent Fuel Act violated the United States Constitution. With narrow exceptions, the challenged act forbade the importation of spent nuclear fuel for disposal or storage in Illinois. The Seventh Circuit ruled: "To pass laws that arbitrarily burden interstate commerce, by forbidding shipments merely because they originate out of state, violates the commerce clause, . . . and it is irrelevant that the traffic is in 'bads' rather than goods." 683 F.2d at 213 (citations omitted). The court rejected an argument that the law was a permissible quarantine measure and found that the case was governed by *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

In the instant case, the Court of Appeals for the Ninth Circuit likewise relied on *City of Philadelphia* in rejecting a quarantine argument and ruling that Initiative 383 violates the Commerce Clause. As respondents will demonstrate below, this decision was correct and should be allowed to stand without further review.

A. *Contrary to petitioner's assertions, this Court's decision in City of Philadelphia v. New Jersey is controlling.*

There is absolutely no merit to petitioner's argument that its petition "presents an important question of constitutional law reserved by this Court's decision in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978)." Pet. at 8. To the contrary, the Commerce Clause issues raised by Initiative 383 were squarely addressed by this Court in *City of Philadelphia*.

In that case, this Court invalidated a New Jersey law that prohibited that importation of most solid or liquid waste originating or collected outside the territorial limits of the state. The New Jersey law contained legislative findings, very similar to the findings in section 1 of Initiative 383, declaring that the growing volume of waste being deposited

in New Jersey threatened the public health, safety and welfare and required the exclusion from New Jersey of waste generated outside the state. This Court held that the New Jersey statute was an unconstitutional protectionist measure regardless of whether the purpose of the New Jersey statute was economic protectionism motivated by financial concerns, or protectionism motivated by concern for the health, safety and welfare of the citizenry at large. 437 U.S. at 626-27. Noting that "the evil of protectionism can reside in legislative means as well as legislative ends," 437 U.S. at 626, this Court ruled that the New Jersey statute violated the Commerce Clause principle of nondiscrimination by unjustifiably treating out-of-state waste more harshly than domestic waste. *Id.* at 626-27.

Similarly, Initiative 383 would permit the transportation and storage of all radioactive waste originating in Washington, while imposing a ban on the transportation and storage of radioactive waste from outside the state. Whatever validity might attach to the findings contained in Initiative 383, the legislative means adopted to effectuate the measure's alleged purpose will not pass muster under this Court's holding in *City of Philadelphia*.

At page eight of its petition, petitioner quotes a portion of this Court's opinion in *City of Philadelphia* in an attempt to show that the decision is not controlling on the uncontested facts here presented. Note, however, that petitioner omitted the sentence that immediately precedes the language excerpted. The quotation should read:

> *The New Jersey statute is not such a quarantine law.* There has been no claim here that the very movement of waste into or through New Jersey endangers health, or that waste must be disposed of as soon and as close to its point of generation as possible.

Id. at 629 (emphasis supplied to indicate sentence omitted by petitioner). The petitioner's argument that this Court's Commerce Clause analysis in *City of Philadelphia* reserved the question "whether the Commerce Clause precludes state prohibitions deemed essential to health and safety," Pet. at 9, is merely a Trojan horse concealing its twice-repeated and

twice-rejected argument that Initiative 383 is a constitutionally permissible quarantine measure.

In *City of Philadelphia*, the proponents of New Jersey's waste exclusion act argued that the measure was analogous to a quarantine and thus not a forbidden protectionist regulation. This Court disagreed, distinguishing the line of cases upholding quarantines from Commerce Clause attack:

> [T]hose quarantine laws banned the importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils. Those laws thus did not discriminate against interstate commmerce as such, but simply prevented traffic in noxious articles, whatever their origins.

437 U.S. at 628-29. This Court noted that New Jersey's objections were directed to the harm caused by the waste after its disposal, at which point there is no basis for distinguishing out-of-state waste from domestic waste. New Jersey's attempt to ban one and permit disposal of the other was held to be clearly impermissible under the Commerce Clause.

Likewise, Initiative 383 suffers from a lack of evenhandedness, and the petitioner simply cannot sustain its thinly veiled argument that the measure is a constitutionally valid quarantine. As the district court pointed out, Initiative 383 exempts domestic waste and impliedly exempts the shipment of out-of-state waste through the state. 518 F. Supp. at 934. Thus, as in *City of Philadelphia*, the principal harm must be said to arise from waste after its disposal, and the state has conceded that there is no essential difference between domestically generated waste and waste generated outside Washington. CR 20, p. 8. Initiative 383 is no quarantine measure.

Furthermore, the analogy between diseased animal carcasses and low-level radioactive waste is a weak one. Laws banning the transportation of diseased animal carcasses are premised upon the assumption that any transportation involves unacceptable health and safety risks. A recent study by the Washington Department of Social and Health Services suggests, however, that radioactive waste, if

properly regulated, can be safely transported. 518 F. Supp. at 935. Washington State "failed to present evidence that non-medical radioactive waste, transported and stored in compliance with Federal regulations, is dangerous to the health and safety of the citizens of the State of Washington." *Id.*

B. *This Court need not even reach the issues raised in the petition because Initiative 383 directly interferes with interstate commerce and is per se invalid.*

In guarded language that glosses over Initiative 383's ban on the transportation and disposal of virtually all out-of-state radioactive waste, the petitioner presents the following Commerce Clause question for review: "Is a state law (Initiative 383) limiting import of low-level radioactive waste consistent with the Commerce Clause, when enacted solely for health and safety reasons and contrary to the state's economic interests?" Pet. at i. This Court need not even reach this issue in order to conclude that the court of appeals correctly decided that Initiative 383 violates the Commerce Clause. This case presents the kind of overt discrimination against interstate commerce that is facially invalid under *City of Philadelphia*. This determination can be made before weighing the state's health and safety rationale: "This dispute about the ultimate legislative purpose need not be resolved, because its resolution would not be relevant to the constitutional issue to be decided . . .." 437 U.S. at 626.

In a long line of cases this Court has held fast to the proposition that the Commerce Clause prevents states from erecting barriers to the free flow of interstate commerce.[6] *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852). Although states remain free to regulate areas of commerce not governed by federal legislation, a state's actions may not offend the basic principle underlying the Commerce Clause

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6. Of course, Congress can authorize a state to act in derogation of the Commerce Clause, but Congress must expressly state its intent and policy to sustain state legislation from attack under the Commerce Clause. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 102 S. Ct. 1096 (1982). Nowhere has Congress expressly or even impliedly authorized Initiative 383.

that "the people of the several states must sink or swim together, and . . . in the long run prosperity and salvation are in union and not division." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

The Commerce Clause permits state regulation that only incidentally burdens interstate commerce, but a state statute that directly interferes with interstate commerce is invalid, regardless of the purpose for which it was enacted. *Edgar v. MITE Corp.*, 102 S. Ct. 2629, 2640 (1982); *Shafer v. Farmers' Grain Co.*, 268 U.S. 189, 199 (1925). Where a state statute patently discriminates against interstate commerce and overtly blocks the flow at its borders, there is a virtually *per se* rule of invalidity. *City of Philadelphia*, 437 U.S. at 624.

By its terms Initiative 383 interdicts the importation of all nonmedical low-level radioactive waste destined for disposal in the state and thus directly interferes with the flow of interstate commerce. By impeding the interstate movement of waste and preventing their efficient disposal, Initiative 383 interferes with the efficient allocation of resources. *Illinois v. General Electric Co.*, 683 F.2d at 213. Initiative 383 thus runs counter to the basic purpose of the Commerce Clause: to assure that our federal republic functions as a single economic unit. *City of Philadelphia*, 437 U.S. at 623. Initiative 383's direct restraint on interstate commerce is *per se* invalid.

C. *The court of appeals correctly decided that Initiative 383 is unconstitutional as measured by the test established by this Court in Pike v. Bruce Church, Inc.*

Even if this Court were to scrutinize Initiative 383 with the more forgiving eye reserved for state regulation that burdens interstate commerce only as an incident to safeguarding health and safety, the measure could not withstand a Commerce Clause challenge. A statute may operate evenhandedly to advance a legitimate local public interest and in so doing incidentally burden interstate commerce, so long as the burden on commerce is not clearly excessive in relation to the local benefits sought to be achieved. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The court of appeals correctly ruled that Initiative 383 cannot pass the test of validity set forth by this Court in *Pike*, that is, that a state law (1) regulate evenhandedly, (2) accomplish a legitimate local public purpose, and (3) only incidentally affect interstate commerce.

The distinction between permitted and prohibited waste under Initiative 383 is based solely on the state of origin. Such discriminatory treatment is wholly inconsistent with the standard of evenhandedness.

Initiative 383 fails as well to accomplish a legitimate local purpose. The measure purports to be a health and safety regulation premised on findings that the risk of accidental release of radioactive materials presents a health hazard. Initiative 383, §§ 1(1), (2), (4). While safeguarding citizens against the hazards of accidental release of radioactivity may well be a legitimate local purpose, Initiative 383 fails to *accomplish* this purpose because it would protect only against hazards posed by waste generated out of state. As the court of appeals noted, the state of Washington did not address "the manner in which local waste, transported and stored with Washington has superior safety and environmental virtues over waste produced elsewhere and similarly controlled by state regulatory measures." 684 F.2d at 631. As we argue below, the state's purposes could be more rationally served by the evenhanded regulation of waste transportation and storage than by a ban on interstate shipments for disposal in this state.

Petitioner's contention that an out-of-state waste ban is contrary to Washington's economic interests may have been made (it was never argued below) to underscore the purported health and safety justification of Initiative 383, but it is irrelevant. Pet. at 9. A state may not discriminate against interstate commerce for either economic or health and safety reasons. *City of Philadelphia*, 437 U.S. at 626-27.

Finally, as we have noted above, Initiative 383 has far more than an incidental burden on interstate commerce. All of the burden of protecting Washington's citizens is placed upon

interstate commerce, which accounts for ninety-five percent of the storage at the Hanford site. As the court of appeals noted,

> Washington receives two-fifths of the country's low-level radioactive waste and has the only site currently available to receive absorbed-liquid low-level waste. Closing Washington's borders would significantly aggravate the national problem of low-level waste disposal. Thus, 383 fails to meet the last part of the *Pike* test and violates the Commerce Clause.

684 F.2d at 631.

D. *The drafters of Initiative 383 have not chosen the least restrictive means available to accomplish their purposes.*

There is no merit to petitioner's argument that the state has adopted the least restrictive alternative available for pursuing its purported objective. Pet. at 15-16. The opposite is true. No limits are placed on the transportation or storage of waste generated within the state. Nor are any safeguards specified to make transportation or storage of all waste safer. No account is taken of geographical considerations that might make interstate shipment safer than intrastate shipment; in fact, in-state mileages for interstate shipments are shorter than mileages for most intrastate shipments. CR 20 at 8. No inspection system is established that might place an evenhanded burden on both interstate and intrastate commerce. Discrimination against interstate commerce is the exclusive and intended result of Initiative 383. In short, Initiative 383 adopts the *most* discriminatory alternative means possible for achieving its purported objective.

II. The Court of Appeals Correctly Ruled That Initiative 383 Is Preempted by Federal Law.

Initiative 383 is a direct obstacle to the accomplishment of congressional objectives with respect to the storage of low-level radioactive waste set forth in the Low-Level Waste Act. Initiative 383 also intrudes into an area of longstanding federal regulation resulting from the Atomic Energy Act of 1954.[7]

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7. Petitioner states, without citation of case authority, that implied preemption is disfavored. Pet. at 16. Yet this Court has stated many times

A. *Initiative 383 conflicts with the congressional objectives stated in the Low-Level Radioactive Waste Policy Act.*

The Low-Level Waste Act was enacted by Congress in 1980 to resolve the growing national problem of adequate storage for low-level radioactive waste. This legislative action was consistent with the federal government's historical and predominant role in the field of nuclear energy in general and protection against radiation hazards in particular.

Briefly, the Low-Level Waste Act authorizes the states to form interstate compacts, which are subject to continuing congressional approval. These compacts are to have authority to manage low-level waste disposal on a regional basis. After January 1, 1986, a compact may have the authority to exclude from its disposal site low-level waste from noncompact states.

Footnote 7 (con't)

that preemption under the Supremacy Clause of the Constitution, Art. VI, cl. 2, may be either express or implied. *See, e.g., Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 102 S. Ct. 3014, 3022 (1982). In the absence of explicit preemptive language, congressional intent to preempt state law may be evidenced in several ways. For example,

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be attained by the federal law and the character of obligations imposed by it may reveal the same purpose.

Rice v. Santa Fe Elevator Corp., 331 U.S. 213, 230 (1947). (Citations omitted).

Moreover, a judicial determination of preemption will result when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978), citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

While the Low-Level Waste Act identifies the role the individual states may play in the disposal process, that role is limited. The focus of the legislation is on the multistate compacts, not the individual states. Both the language and the legislative history of the Low-Level Waste Act show that Congress intended to maintain federal authority and control over the area of low-level waste disposal through continuing federal review of the compacts and continuing federal regulation of the waste storage sites. Initiative 383 not only intrudes into this area of federal authority, but it directly conflicts with Congress' regulatory scheme.

Petitioner asserts that the Low-Level Waste Act authorizes Washington to ban unilaterally the importation of radioactive waste generated outside the state. Yet there is no language in the Act that can be interpreted as giving a single state, acting on its own and not as part of a compact, the authority to ban waste from outside its borders. With respect to single states, the Low-Level Waste Act says only that "each State is responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders," 42 U.S.C. § 2012d(a)(1)(A), and that "the State may enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste." 42 U.S.C. § 2021d(a)(2)(A). The remainder of the Low-Level Waste Act refers to the actions of compact states rather than individual states.

Most significantly, the Low-Level Waste Act provides that only states acting as part of a congressionally approved compact may restrict the use of a waste disposal facility. 42 U.S.C. § 2021d(a)(2)(B). This point was stressed by both the court of appeals and the district court. 684 F.2d at 630; 518 F. Supp. at 932. Moreover, under the Low-Level Waste Act, any such restriction of a waste disposal facility may not occur until after January 1, 1986. 42 U.S.C. § 2021d(a)(2)(B). Initiative 383, by contrast, would permit Washington to ban the importation of waste as of July 1, 1981.

Petitioner suggests that the Low-Level Waste Act contains a plan for the interim storage of commercial radioactive

waste at federal disposal facilities and that such a plan demonstrate Congress' intent to permit a single state to ban presently the importation of waste. Pet. at 18. The Low-Level Waste Act, however, does not contain a plan for storage of commercial waste at federal facilities; rather, it authorizes the Secretary of the Department of Energy to prepare a report regarding several matters, including the status of existing commercial waste sites and the capability of federal disposal facilities to provide "interim storage." 42 U.S.C. § 2021d(b)(1). Nothing in the Low-Level Waste Act authorizes federal facilities to receive commercial waste on an interim basis. The reference to "interim storage" is an element in the scope of the DOE Report, nothing more, and provides scant justification for petitioner's claim that a single state can ban radioactive waste from other states.

Petitioner also quotes selective portions of the legislative history of the Low-Level Waste Act in an effort to show that Congress, by blessing Initiative 383, authorized Washington to unilaterally ban the importation of radioactive waste before any compacts were approved by Congress. Petitioner's selections of legislative history, however, are taken out of context and do not accurately reflect the meaning of the speakers' remarks when read in their entirety. For example, the statement of Senator Thurmond quoted by petitioner at page 18 was preceded and followed by the remarks that are italicized below:

> *Both Chambers have now passed bills encouraging the development of such agreements or compacts to allow for the management and disposal of low-level, radioactive waste on a regional basis. Both bills also provide that, once Congress has approved a regional compact, nuclear waste generated in States which are not a member of the compact may be excluded from burial within the compact boundaries. This exclusivity power is an essential feature of any workable regional compact plan for the safe disposal of low-level nuclear wastes.*
>
> I wish to leave the responsibility for handling this problem where it rightfully belongs—with the individual States. *At the same time, the seriousness of the problem on a national basis demands that the States be encouraged to promptly cooperate among themselves,*

> *a result that will not be forthcoming if the Congress fails to enact this legislation now.*

126 Cong. Rec. S 16544 (daily ed. Dec. 13, 1980) (emphasis added).

Petitioner similarly has ignored other portions of legislative history that reflect Congress' awareness that restrictions of waste storage sites could be contrary to the Commerce Clause and therefore should be permitted only by congressionally-approved compacts and only after January 1, 1986. For example, Representative Udall made the following remarks about the Low-Level Waste Act:

> These compacts must be approved by Congress, and cannot take effect before 1986. These protections assure that the compacts will not have a deleterious effect on interstate commerce, and that all States and regions will have adequate time to develop disposal facilities.

126 Cong. Rec. H 12495 (daily ed. Dec. 13, 1980).

In short, a fair reading of the legislative history shows that (1) regional compacts were to be devices for regulating low-level waste disposal, (2) exclusionary power could only be exercised through the compact arrangement, (3) before such exclusionary power could be exercised, congressional ratification of the compacts would be required, and (4) such exclusionary action, in any event, could not take place before 1986.

Even if the legislative history were considered to be ambiguous, the petitioner has not met the high burden of showing that Congress "expressly stated its intent and policy" to sustain state legislation that violates the Commerce Clause. *New England Power Company v. New Hampshire*, 102 S. Ct. at 1102-03. More is required than "mere speculation as to what Congress 'probably had in mind' " before discriminatory state legislation will be upheld. *Id.*

Initiative 383 authorizes the state of Washington to begin banning the importation of low-level radioactive waste on July 1, 1981. The Low-Level Waste Act, however, provides that only congressionally-approved compacts may have authority to restrict importation of waste and that such authority will not arise until January 1, 1986. The

congressional answer to the national problem of low-level waste storage is the regional compact, not unilateral state action that frustrates the orderly development of such compacts.[8] Initiative 383, with its authorization of such unilateral state action, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978), citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

As the court of appeals concluded,

> Initiative 383 was not framed in terms of the Northwest [Regional] Compact. It was an unqualified closing of the Richland facility to all out-of-state users. As such, it violates the Supremacy Clause.

684 F.2d at 630.

B. *Initiative 383 intrudes into a field of federal regulation deriving from the Atomic Energy Act of 1954.*

Petitioner completely ignores the decision of both courts below that the pervasive scheme of federal regulation that preempts Initiative 383 includes the Atomic Energy Act of 1954 ("Atomic Energy Act"). As the court of appeals stated, "the initiative violates the Supremacy Clause because it seeks to regulate legitimate federal activity and to avoid the preemption of the Atomic Energy Act." 684 F.2d at 630.

The Atomic Energy Act contains a long-standing and comprehensive scheme for federal control of the private use of nuclear energy. This scheme includes a requirement of federal licenses for possession, transfer or use of nuclear materials and for the construction and operation of facilities that produce or use these materials. 42 U.S.C. §§ 2073, 2092, 2111, 2131.

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8. Petitioner falsely accuses the respondents of "a desire to defer development of a national waste management policy solely at the risk of Washington residents," Pet. at 14, while ignoring that Congress has established a national policy for the management of low-level waste in the Low-Level Waste Act.

Section 274 of the Atomic Energy Act was added in 1959 to authorize the Nuclear Regulatory Commission (the "Commission") to enter into agreements with the Governors of states ("agreement states") which would assume some of the Commission's regulatory powers for the duration of the agreement. In particular, an agreement state may assume certain regulatory powers of the Commission under subchapters V, VI and VII of the Atomic Energy Act, which pertain primarily to licensing. 42 U.S.C. § 2021(b). Any state regulation enacted pursuant to a Section 274 agreement is required to be coordinated and compatible with Commission programs for protection against radiation hazards. 42 U.S.C. § 2021(g).

It is implicit in Section 274 of the Atomic Energy Act that Congress has plenary authority to regulate in the area of protection against radiation hazards. *Pacific Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission*, 659 F.2d 903, 921 (9th Cir. 1981), *cert. granted sub nom. Pacific Gas & Electric Co. v. State Energy Resoures Conservation & Development Commission*, 102 S. Ct. 2956 (1982); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1149-50 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972). Accordingly, a state's power to regulate in that area derives solely from and can never go beyond the particular terms of its Section 274 agreement. *See* S. Rep. No. 870, 86th Cong., 1st Sess. 9, *reprinted in* 1959 *U.S. Code Cong. & Ad. News* 2872.

Washington has been an agreement state since 1966. Washington's authority under its agreement with the Commission is confined primarily to licensing nuclear materials. In Article V of the agreement, Washington obligates itself to use its best efforts to assure that its program will at all times be compatible with the Commission's regulatory program. Article VII of the agreement states that the Commission may suspend or terminate the agreement if it determines that such action is necessary to protect public health and safety.

Initiative 383, in attempting to protect against radiation hazards by imposing an almost total ban on the

transportation and storage of radioactive waste generated outside the borders of the state, goes far beyond the scope of authority granted to Washington in its agreement with the Commission. The limited power to regulate nuclear materials does not encompass the power to ban such materials, and particularly to ban them discriminatorily on the basis of their state of origin. To regulate is to grant permission to operate under defined standards; it is not the power to prohibit an activity altogether. 36A *Words and Phrases* "Regulate," 315-21 (West 1962). As the court of appeals explained:

> The regulation of the disposal of low-level radioactive waste is a legitimate federal activity, and Congress has not waived or delegated its authority over the subject. The United States' § 274 agreement with the State of Washington gives the State authority over such matters as licensing, inspection, and levying of lease and maintenance fees. However, as the district court correctly points out, complete control of the Richland site did not pass with the assignment of regulatory responsibilities.

684 F.2d at 620.

Furthermore, Initiative 383's ban on the importation of radioactive waste directly conflicts with the state's promise in Article V of the Agreement to use its best efforts to maintain uniform regulatory schemes throughout the United States. Section 274's compatibility requirement reflects congressional recognition that centralized authority and uniform regulation are essential to preserve the dominant federal interest in encouraging the development of nuclear power while protecting the public against radiation hazards. 42 U.S.C. § 2013. Attainment of these dual goals requires coordination and cooperation among the states and between each state and the federal government. Initiative 383 conflicts with these goals by banning interstate shipments of radioactive waste from a geologically and demographically suitable disposal site in Washington.

As the courts below correctly concluded, because Initiative 383 exceeds the authority granted to the state of Washington

under Section 274 of the Atomic Energy Act, it intrudes into a field occupied by the federal government and violates the Supremacy Clause.

In summarizing the preemption issue, the court of appeals held that "[n]either § 274 of the Act nor the Low-Level Waste Act is a grant of total authority to the states over the disposal of low-level wastes within their own borders." 684 F.2d at 630.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Dated this 17th day of December, 1982.

Respectfully submitted,

PRESTON, THORGRIMSON,
ELLIS & HOLMAN

By: MICHAEL B. CRUTCHER
CATHERINE B. ROACH
ROBERTA R. KATZ

APPENDIX A

Section 274 of the

ATOMIC ENERGY ACT OF 1954
42 U.S.C. § 2021

§ 2021. Cooperation with States

(a) Purpose

It is the purpose of this section—

(1) to recognize the interests of the States in the peaceful uses of atomic energy, and to clarify the respective responsibilities under this chapter of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials;

(2) to recognize the need, and establish programs for, cooperation between the States and the Commission with respect to control of radiation hazards associated with use of such materials;

(3) to promote an orderly regulatory pattern between the Commission and State governments with respect to nuclear development and use and regulation of byproduct, source, and special nuclear materials;

(4) to establish procedures and criteria for discontinuance of certain of the Commission's regulatory responsibilities with respect to byproduct, source, and special nuclear materials, and the assumption thereof by the States;

(5) to provide for coordination of the development of radiation standards for the guidance of Federal agencies and cooperation with the States; and

(6) to recognize that, as the States improve their capabilities to regulate effectively such materials, additional legislation may be desirable.

(b) Agreements with States

Except as provided in subsection (c) of this section, the Commission is authorized to enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority of the Commission under subchapters V, VI, and VII of this chapter, and section 2201 of this title,

with respect to any one or more of the following materials within the State—

(1) byproduct materials as defined in section 2014(e)(1) of this title;

(2) byproduct materials as defined in section 2014(e)(2) of this title;

(3) source materials;

(4) special nuclear materials in quantities not sufficient to form a critical mass.

During the duration of such an agreement it is recognized that the State shall have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards.

(c) Commission regulation of certain activities

No agreement entered into pursuant to subsection (b) of this section shall provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of—

(1) the construction and operation of any production or utilization facility;

(2) the export from or import into the United States of byproduct, source, or special nuclear material, or of any production or utilization facility;

(3) the disposal into the ocean or sea of byproduct, source, or special nuclear waste materials as defined in regulations or orders of the Commission;

(4) the disposal of such other byproduct, source, or special nuclear material as the Commission determines by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission.

The Commission shall also retain authority under any such agreement to make a determination that all applicable standards and requirements have been met prior to termination of a license for byproduct material, as defined

in section 2014(e)(2) of this title. Notwithstanding any agreement between the Commission and any State pursuant to subsection (b) of this section, the Commission is authorized by rule, regulation, or order to require that the manufacturer, processor, or producer of any equipment, device, commodity, or other product containing source, byproduct, or special nuclear material shall not transfer possession or control of such product except pursuant to a license issued by the Commission.

(d) Conditions

The Commission shall enter into an agreement under subsection (b) of this section with any State if—

(1) The Governor of that State certifies that the State has a program for the control of radiation hazards adequate to protect the public health and safety with respect to the materials within the State covered by the proposed agreement, and that the State desires to assume regulatory responsibility for such materials; and

(2) the Commission finds that the State program is in accordance with the requirements of subsection (o) of this section and in all other respects compatible with the Commission's program for the regulation of such materials, and that the State program is adequate to protect the public health and safety with respect to the materials covered by the proposed agreement.

(e) Publication in Federal Register; comment of interested persons

(1) Before any agreement under subsection (b) of this section is signed by the Commission, the terms of the proposed agreement and of proposed exemptions pursuant to subsection (f) of this section shall be published once each week for four consecutive weeks in the Federal Register; and such opportunity for comment by interested persons on the proposed agreement and exemptions shall be allowed as the Commission determines by regulation or order to be appropriate.

(2) Each proposed agreement shall include the proposed effective date of such proposed agreement or exemptions.

The agreement and exemptions shall be published in the Federal Register within thirty days after signature by the Commission and the Governor.

(f) Exemptions

The Commission is authorized and directed, by regulation or order, to grant such exemptions from the licensing requirements contained in subchapters V, VI, and VII of this chapter, and from its regulations applicable to licensees as the Commission finds necessary or appropriate to carry out any agreement entered into pursuant to subsection (b) of this section.

(g) Compatible radiation standards

The Commission is authorized and directed to cooperate with the States in the formulation of standards for protection against hazards of radiation to assure that State and Commission programs for protection against hazards of radiation will be coordinated and compatible.

(h) Consultative, advisory and miscellaneous functions of the Administrator of the Environmental Protection Agency

The Administrator of the Environmental Protection Agency shall consult qualified scientists and experts in radiation matters, including the President of the National Academy of Sciences, the Chairman of the National Committee on Radiation Protection and Measurement, and qualified experts in the field of biology and medicine and in the field of health physics. The Special Assistant to the President for Science and Technology, or his designee, is authorized to attend meetings with, participate in the deliberations of, and to advise the Administrator. The Administrator shall advise the President with respect to radiation matters, directly or indirectly affecting health, including guidance for all Federal agencies in the formulation of radiation standards and in the establishment and execution of programs of cooperation with States. The Administrator shall also perform such other functions as the President may assign to him by Executive order.

(i) Inspections and other functions; training and other assistance

The Commission in carrying out its licensing and regulatory responsibilities under this chapter is authorized to enter into agreements with any State, or group of States, to perform inspections or other functions on a cooperative basis as the Commission deems appropriate. The Commission is also authorized to provide training, with or without charge, to employees of, and such other assistance to, any State or political subdivision thereof or group of States as the Commission deems appropriate. Any such provision or assistance by the Commission shall take into account the additional expenses that may be incurred by a State as a consequence of the State's entering into an agreement with the Commission pursuant to subsection (b) of this section.

(j) Reserve power to terminate or suspend agreement; emergency situations; State nonaction on causes of danger; authority exercisable only during emergency and commensurate with danger

(1) The Commission, upon its own initative after reasonable notice and opportunity for hearing to the State with which an agreement under subsection (b) of this section has become effective, or upon request of the Governor of such State, may terminate or suspend all or part of its agreement with the State and reassert the licensing and regulatory authority vested in it under this chapter, if the Commission finds that (1) such termination or suspension is required to protect the public health and safety, or (2) the State has not complied with one or more of the requirements of this section. The Commission shall periodically review such agreements and actions taken by the States under the agreements to ensure compliance with the provisions of this section.

(2)The Commission, upon its own motion or upon request of the Governor of any State, may, after notifying the Governor, temporarily suspend all or part of its agreement with the State without notice or hearing if, in the judgment of the Commission:

(A) an emergency situation exists with respect to any material covered by such an agreement creating danger which requires immediate action to protect the health or safety of persons either within or outside the State, and

(B) the state has failed to take steps necessary to contain or eliminate the cause of the danger within a reasonable time after the situation arose.

A temporary suspension under this paragraph shall remain in effect only for such time as the emergency situation exists and shall authorize the Commission to exercise its authority only to the extent necessary to contain or eliminate the danger.

(k) State regulation of activities for certain purposes

Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

(l) Commission regulated activites; notice of filing; hearing

With respect to each application for Commission license authorizing an activity as to which the Commission's authority is continued pursuant to subsection (c) of this section, the Commission shall give prompt notice to the State or States in which the activity will be conducted of the filing of the license application; and shall afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application without requiring such representatives to take a position for or against the granting of the application.

(m) Limitation of agreements and exemptions

No agreement entered into under subsection (b) of this section, and no exemption granted pursuant to subsection (f) of this section, shall affect the authority of the Commission under section 2201(b) or (i) of this title to issue rules, regulations, or orders to protect the common defense and security, to protect restricted data or to guard against the loss or diversion of special nuclear material. For purposes of section 2201(i) of this title, activities covered by

exemptions granted pursuant to subsection (f) of this section shall be deemed to constitute activities authorized pursuant to this chapter; and special nuclear material acquired by any person pursuant to such an exemption shall be deemed to have been acquired pursuant to section 2073 of this title.

(n) Definitions

As used in this section, the term State means any State, Territory, or possession of the United States, the Canal Zone, Puerto Rico, and the District of Columbia. As used in this section, the term "agreement" includes any amendment to any agreement.

(o) State compliance requirements: compliance with section 2113(b) of this title and health and environmental protection standards; procedures for licenses, rulemaking, and license impact analysis; amendment of agreements for transfer of State collected funds; proceedings duplication restriction

In the licensing and regulation of byproduct material, as defined in section 2014(e)(2) of this title, or of any activity which results in the production of byproduct material as so defined under an agreement entered into pursuant to subsection (b) of this section, a State shall require—

(1) compliance with the requirements of subsection (b) of section 2113 of this title (respecting ownership of byproduct material and land), and

(2) compliance with standards which shall be adopted by the State for the protection of the public health, safety, and the environment from hazards associated with such material which are equivalent, to the extent practicable, or more stringent than, standards adopted and enforced by the Commission for the same purpose, including requirements and standards promulgated by the Commission and the Administrator of the Environmental Protection Agency pursuant to sections 2113, 2114, and 2022 of this title, and

(3) procedures which—

(A) in the case of licenses, provide procedures under State law which include—

(i) an opportunity, after public notice, for written comments and a public hearing, with a transcript,

(ii) an opportunity for cross examination, and

(iii) a written determination which is based upon findings included in such determination and upon the evidence presented during the public comment period and which is subject to judicial review;

(B) in the case of rulemaking, provide an opportunity for public participation through written comments or a public hearing and provide for judicial review of the rule;

(C) require for each license which has a significant impact on the human environment a written analysis (which shall be available to the public before the commencement of any such proceedings) of the impact of such license, including any activities conducted pursuant thereto, on the environment, which analysis shall include—

(i) an assessment of the radiological and nonradiological impacts to the public health of the activities to be conducted pursuant to such license;

(ii) an assessment of any impact on any waterway and groundwater resulting from such activities;

(iii) consideration of alternatives, including alternative sites and engineering methods, to the activities to be conducted pursuant to such license; and

(iv) consideration of the long-term impacts, including decommissioning, decontamination, and reclamation impacts, associated with activities to be conducted pursuant to such license, including the management of any byproduct material, as defined by section 2014(e)(2) of this title; and

APPENDIX B

PUBLIC LAW 96-573 [S.2189]; December 23, 1980

LOW-LEVEL RADIOACTIVE WASTE POLICY ACT

An Act to set forth a Federal policy for the disposal of low-level radioactive wastes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Section 1. This Act may be cited as the "Low-Level Radioactive Waste Policy Act".

DEFINITIONS

Sec. 2. As used in this Act—

1) The term "disposal" means the isolation of low-level radioactive waste pursuant to requirements established by the Nuclear Regulatory Commission under applicable laws.

2) The term "low-level radioactive waste" means radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or byproduct material as defined in section 11e.(2) of the Atomic Energy Act of 1954.

3) The term "State" means any State of the United States, the District of Columbia, and, subject to the provisions of Public Law 96-205, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.

4) For purposes of this Act the term "atomic energy defense activities of the Secretary" includes those activities and facilities of the Department of Energy carrying out the function of—

(i) Naval reactors development and propulsion,

(ii) weapons activities, verification and control technology,

(iii) defense materials production,

(iv) inertial confinement fusion,

(v) defense waste management, and

(vi) defense nuclear materials security and safeguards (all as included in the Department of Energy appropriations account in any fiscal year for atomic energy defense activities).

GENERAL PROVISIONS

Sec. 3. (a) Compacts established under this Act or actions taken under such compacts shall not be applicable to the transportation, management, or disposal of low-level radioactive waste from atomic energy defense activities of the Secretary or Federal research and development activities.

(b) Any facility established or operated exclusively for the disposal of low-level radioactive waste produced by atomic energy defense activities of the Secretary or Federal research and development activities shall not be subject to compacts established under this Act or actions taken under such compacts.

LOW-LEVEL RADIOACTIVE WASTE DISPOSAL

Sec. 4. (a)(1) It is the policy of the Federal Government that—

(A) each State is responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders except for waste generated as a result of defense activities of the Secretary or Federal research and development actitities; and

(B) low-level radioactive waste can be most safely and efficiently managed on a regional basis.

(2)(A) To carry out the policy set forth in paragraph (1), the States may enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste.

(B) A compact entered into under subparagraph (A) shall not take effect until the Congress has by law consented to the compact. Each such compact shall provide that every 5 years after the compact has taken effect the Congress may by law withdraw its consent. After January 1, 1986, any such compact may restrict the use of the regional disposal facilities under the compact to the disposal of low-level radioactive waste generated within the region.

(b)(1) In order to assist the States in carrying out the policy set forth in subsection (a)(1), the Secretary shall prepare and submit to Congress and to each of the States within 120 days after the date of the enactment of this Act a report which—

(A) defines the disposal capacity needed for present and future low-level radioactive waste on a regional basis;

(B) defines the status of all commercial low-level radioactive waste disposal sites and includes an evaluation of the license status of each such site, the state of operation of each site, including operating history, an analysis of the adequacy of disposal technology employed at each site to contain low-level radioactive wastes for their hazardous lifetimes, and such recommendations as the Secretary considers appropriate to assure protection of the public health and safety from wastes transported to such site;

(C) evaluates the transportation requirements on a regional basis and in comparison with performance of present transportation practices for the shipment of low-level radioactive wastes, including an inventory of types and quantities of low-level wastes, and evaluation of shipment requirements for each type of waste and an evaluation of the ability of generators, shippers, and carriers to meet such requirements; and

(D) evaluates the capability of the low-level radioactive waste disposal facilities owned and operated by the Department of Energy to provide interim storage for commercially generated low-level waste and estimates the costs associated with such interim storage.

(2) In carrying out this subsection, the Secretary shall consult with the Governors of the States, the Nuclear Regulatory Commission, the Environmental Protection Agency, the United States Geological Survey, and the Secretary of Transportation, and such other agencies and departments as he finds appropriate.

Approved December 22, 1980.

LEGISLATIVE HISTORY:

SENATE REPORT No. 96-548 (Comm. on Energy and Natural Resources).

CONGRESSIONAL RECORD, Vol. 126 (1980):

July 28-30, considered and passed Senate.

Dec. 3, H.R. 8378 considered and passed House; passage vacated and S. 2189, amended, passed in lieu.

Dec. 13, Senate agreed to the House amendment with amendments; House agreed to Senate amendments.